81 -2308

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FILED
JUN 18 1982
ALEXANDER L. STEVAS,
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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHNNY LAWRENCE CAPPS — PETITIONER

VS. ON WRIT OF CERTIORARI
FROM THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR CERTIORARI

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Petition for Certiorari have been mailed to Hon Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, this 16th day of June, 1982.

David W. Lamar

DAVID W. LAMAR

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER'S CONSTITUTIONAL GUARANTEE TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF MITIGATING EVIDENCE DURING THE PERSISTENT FELONY PHASE OF THE TRIAL?

2. WHETHER THE KENTUCKY PERSISTENT FELONY OFFENDER STATUTE (KRS 532.080) IS UNCONSTITUTIONAL IN DENYING "DUE PROCESS" GUARANTEED BY THE 14TH AMENDMENT BECAUSE, AS APPLIED, IT PROHIBITED THE JURY FROM CONSIDERING MITIGATING EVIDENCE OFFERED BY THE PETITIONER.

3. WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT AND PROSECUTOR FAILED TO PROVIDE THE PETITIONER WITH EXCULPATORY INFORMATION IN THEIR POSSESSION?

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LOWER COURT PROCEEDINGS, JURISDICTION AND STATE LAW INVOLVED

The Petitioner respectfully requests the Supreme Court of the United States to grant Certiorari in order to review the final judgment of the highest court of the Commonwealth of Kentucky (Appendix, Page A-1), entered February 16, 1982 (Re-hearing denied April 20, 1982; Appendix, Page A-10). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

This case involves the interpretation of the United States Constitution, Amendments 14, §1 and 8 (Appendix, Page A-15) and the Kentucky Persistent Felony Offender Statute, KRS 532.080 (Appendix, Page A-16).

STATEMENT OF THE CASE

On August 6, 1980, a four-count indictment was returned in the Henderson Circuit Court charging the Petitioner, Johnny Lawerence Capps (and his brother William Orville Capps), in separate counts with the offenses of first degree burglary, theft by unlawful taking, and with being first degree persistent felony offenders in violation of KRS 511.020, KRS 514.030, and KRS 532.080, respectively. According to Counts 1 and 2, the Petitioner and his brother, on June 18, 1980, "committed first degree burglary by unlawfully entering the dwelling house of James and Jolene Buley" and each were first degree persistent felony offenders. According to Counts 3 and 4, on June 18, 1980, each "committed theft by taking" items "of the value of $100.00 or more," and each were first degree persistent felony offenders.

On August 11, 1980, Petitioner filed a motion for discovery "requiring the Commonwealth to make available to the Petitioner all information. . . which tends to excupate the Petitioner either through an indication of his innocence or through the potential impeachment of any Commonwealth witnesses." The trial court sustained this motion on August 18, 1980.

On August 18, 1980, Petitioner was formally arraigned, with his privately retained attorney, and entered a plea of not guilty.

During the trial, held October 2-4, 1980, the Petitioner relied upon the defense of intoxication and insanity.

Darrell Skaggs, one of the witnesses for the prosecution, testified that he noticed nothing unusual about the physical appearance of the Petitioner. He had been with the Petitioner shortly after the victim's home had been entered by the Petitioner.

Upon cross examination, Skaggs testified that he was interviewed by the prosecution, Mr. Polk, and that Mr. Polk jotted notes on a yellow sheet of paper. Petitioner then requested disclosure of the notes, and for the trial court to make an incamera inspection of the notes. After the trial court inspected the notes, the trial court ruled that the defense was "not entitled to them."

The trial court eventually placed the notes in the record for purposes of appeal. The notes were sketchy and not full sentences but did contain these highly material statements:

Both drinking
- Small one had blue ribbon
- More intoxicated than small one (appendix ____)

Both the Petitioner and his brother testified. They each testified concerning their problems involving alcohol. The Petitioner placed some of the blame for alcoholism to the condition of his son, a quadriplegic.

A psychologist and a psychiatrist also testified on behalf of the Petitioner.

The jury, after hearing conflicting testimony as to intoxication, returned a verdict of guilty on both the burglary and theft charges and fixes the punishment at ten years and two years, respectively.

After Appellants were convicted of the principal offenses, the persistent felony phase of the bifurcated trial was conducted. To sustain these enhancement charges, the prosecution proved that the Petitioner was born June 27, 1943; that he had four prior felony convictions; that he was "released" from probation from his last conviction on October 29, 1977.

During the Persistent Felony Offender phase of the trial, counsel for the Petitioner, in his opening statement, attempted to inform the jury that he would present a number of witnesses to introduce mitigating evidence why the jury should not enhance the Petitioner's sentence. The trial court sustained the prosecutor's objection to

these comments, and admonished the jury not to consider the remarks made by counsel.

Counsel for the Petitioner argued to the trial court that constitutional due process required the court to permit mitigating evidence during the sentencing phase of the trial. The trial court overruled Petitioner's request. The court refused to allow the Petitioner to introduce mitigating evidence through witnesses, which were available and ready to testify.

During closing arguments, the prosecutor, among other things, stated that the jury had no discretion as to guilt or innocence.

Contrary to their pleas, the Petitioner and his brother, on October 4, 1980, were each convicted as a first degree persistent felony offender and their sentences for burglary were each enhanced to twenty years, and their sentences for theft were each enhanced to ten years.

The Petitioner's motion for new trial was overruled.

Judgment was entered on October 14, 1980, with the sentence, totalling thirty years, to run consecutively (Appendix, Page A-11).

On Appeal to the Supreme Court of Kentucky, the Petitioner alleged violations of Federal Constitutional

rights under the 14th and 8th Amendments as a result of the denial of his right to introduce mitigating evidence during the sentencing phase of the trial and also for the failure of the prosecution and the trial court to provide ordered exculpatory evidence to the Petitioner.

The Supreme Court of Kentucky, the highest court within the Commonwealth of Kentucky, issued an opinion on February 16, 1982 (Appendix, Page A-1). Re-hearing denied April 20, 1982 (Appendix, Page A-10). The Court reversed the burglary conviction and PFO enhancement thereof, but affirmed the theft conviction with the enhanced sentence of ten years. The Court did not address the constitutional arguments raised by the Petitioner.

From that decision of the Supreme Court of Kentucky, the Petitioner respectfully requests a review by the Supreme Court of the United States.

ARGUMENT

1. THE PETITIONER'S CONSTITUTIONAL GUARANTEE TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF MITIGATING EVIDENCE DURING THE PERSISTENT FELONY PHASE OF THE TRIAL.

2. THE KENTUCKY PERSISTENT FELONY OFFENDER STATUTE (KRS 532.080) IS UNCONSTITUTIONAL IN DENYING "DUE PROCESS" GUARANTEED BY THE 14TH AMENDMENT BECAUSE, AS APPLIED, IT PROHIBITED THE JURY FROM CONSIDERING MITIGATING EVIDENCE OFFERED BY THE PETITIONER.

At the start of his opening statement during the persistent felony phase of the bifurcated trial, counsel for the Petitioner told the jury that he would present a number of witnesses to introduce mitigating evidence why the jury should not enhance the convictions (TE 6 796-797). The prosecutor objected to this; and after a brief hearing at the bench, the parties retired to chambers (TE 6 797-799).

During an in-chambers hearing (TE 6 799-808), Petitioner's counsel argued that to deny him the right to introduce evidence in mitigation would deprive him of fundamental due process of law since sentencing was a critical stage (TE 6 803, 808). However, the trial court ruled that this type of evidence could not be admitted during this state of the proceeding (TE 6 808). At that point, defense counsel stated:

> . . .Note my exception to the ruling on constitutional grounds, on the case law of Kentucky, we feel like it is denying the defendant, Johnny Lawrence Capps, fundamental fairness and due process of law which are constitutional violations, and is grossly denying him a fair trial at this stage of the proceedings. [Id.]

Back in front of the jury, defense counsel proceeded with his opening statement. When he attempted to inform the jury what these "mitigating" witnesses would testify to, the trial judge sustained the objections by the prosecutor and admonished the jury not to consider the remarks made by counsel (TE 6 809-813).

After the prosecution introduced its evidence on the charge that the Petitioner was a first degree persistent felony offender, counsel again argued that:

> . . .due procees. . . would dictate that we would be entitled to put on mitigating circumstances, mitigating factors, and to be able to prove the character to see whether or not this jury deems either the original offense — the original offenses or the character of a defendant of such a nature that they wish to enhance a sentence (TE 6 877).

However, the trial court again ruled that these "character" witnesses would not be admissable (TE 6 877-878). The trial court then told Petitioner's counsel to

outline what he wanted to introduce by these witnesses to protect the record for appellate review (TE 6 878-879).

After defense counsel outlined this proposed testimony (TE 6 879-885), the trial judge ruled the evidence inadmissible. Defense counsel then introduced this testimony by way of avowal (TE 7 940-972). Defense counsel wanted to call Clay Taylor, Petitioner's probation officer, to testify that serving a lengthy sentence would not benefit the Petitioner's rehabilitation (TE 7 941); the Petitioner to testify that he is buying his own home, that he has gone to the Volta House since his arrest for alcohol treatment, and that he has never lost a job due to his alcoholism (TE 7 942-944, 947); the Petitioner's son, to testify that his father has had a hard time adjusting since his accident, that the accident has depressed his father, and that he doesn't know who will help him if his father was incarcerated (TE 7 948-951); Jo Ann, Petitioner's wife, to testify that he had a good character and was a good provider (TE 7 955); Tong to testify that in spite of Petitioner's prior convictions, he had a good character for honesty, and that he was dedicated to his wife and family (TE 7 957, 959); and Offerman to testify that Petitioner was always assisting his quadriplegic son, and that he trusted Petitioner (TE 7 968-969).

Petitioner submits that he has been denied his fundamental rights under the United States Constitution to present a defense and to due process of law guaranteed by the 14th Amendment (Appendix, Page A-15).

The Petitioner also submits he has been subjected to cruel and unusual punishment in violation of the United States Constitution because he has been sentenced to ten years, without parole, by a jury exercising standardless discretion without sufficient information regarding his background and character.

There is no doubt that constitutional principles apply to sentencing--even a persistent felony trial. In Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977), the Court stated, "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."

Historically, Kentucky has long had jury sentencing. It is this tradition of jury sentencing which is embodied in the persistent felon statute which requires empanelling the same or a different jury to determine if the defendant has attained the "status" of being a persistent felon. KRS 532.080(1). The jury is given discretion to sentence the defendant within a wide range -- in this case 2 - 20

years. KRS 532.080(5) and (6). The statute does not define any criteria for application of this sentencing range. It is left to the unbridled discretion of the jury.

The Petitioner submits that this range of sentences necessarily implies that the jury is entitled to consider background information and/or mitigating evidence during the persistent felony offender proceeding. KRS 532.080(7) precludes the normal judicial options of probation, shock probation and conditional discharge for defendants such as Petitioner. Subsection (7) also precludes the executive option of parole for ten years. Therefore, it is essential that the sentencing body (the jury) be permitted necessary information before making its determination. Since sentencing discretion is given to the jury, the only way the concept of individualized sentencing in criminal cases will have any significance is if the jury is given the fullest information possible concerning the defendant's life and characteristics. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); contra, White v. Commonwealth, Ky. App., 611 S.W.2d 529 (1980).

Petitioner also submits that the trial court denied him the federal constitutional right to present witnesses in his behalf. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). It matters not whether "the jury. . .would have accepted this line of

reasoning had counsel been permitted to fully present it...[T]he jurors were entitled to have the benefit of defense theory before them." David v. Alaska, *415 U.S. 308, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).*

This Court can never lose sight of the fact that the persistent felony statute is strictly penal in nature. Therefore, the exclusion of Petitioner's evidence subjected him to cruel and unusual punishment because the sentencing body imposed punishment without any standards and without necessary mitigating information.

The Supreme Court of Kentucky has long recognized that jurors have the right in persistent felony prosecutions to disregard conclusively established proof of prior convictions. Satterly v. Commonwealth, *Ky., 437 S.W.2d 929 (1969). In* Coleman v. Commonwealth, *276 Ky. 802, 125 S.W.2d 728, 729 (1939), the Court observed that in such cases "it has not been unusual for juries to disregard former convictions. Perhaps they deemed the principal crime for which the accused was being tried not to merit such severe punishment or that the character of the man himself did not justify it."*

Such pronouncements by the Kentucky Supreme Court have in effect sanctioned jury nullification. Therefore,

if the jury can use the "character of a man" to return a not guilty verdict as a persistent felony offender, it follows that the jury can use this same evidence to return a penalty within the proscribed statutory range.

Petitioner has the constitutional right to have the sentencer consider as mitigating factors any aspect of his character and any aspect of the offense that he proffers. Cf. Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978). When the jury was precluded from considering this mitigating evidence, Petitioner was denied a fair trial.

This Court has recently decided in a capital punishment case that the Eighth and 14th Amendments require not only the sentencer to consider any mitigating factor, but further that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, ____ U.S. ____, 71 L.Ed.2d 1, 102 S.Ct. ____, (1982).

In the present case, the trial court presumably considered KRS 532.080 an automatic enhancement of the punishment fixed by the jury during the initial phase of the trial. The Prosecutor was even permitted to argue that the jury had "no discretion as to guilt or innocence if you believe that these two men have been convicted as appears on the board (TE 6 937).

Without the benefit of any evidence upon which the jury could exercise discretion, the jury's decision in this case was automatic.

An automatic procedure was held invalid in United States v. McCoy, 429 F.2d 739 (1970).

3. THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT AND PROSECUTOR FAILED TO PROVIDE THE PETITIONER WITH EXCULPATORY INFORMATION IN THEIR POSSESSION?

On August 11, 1980, Petitioner filed a motion for discovery "requiring the [C]ommonwealth to make available to the defendant all information. . .which tends to exculpate the defendant either through an indication of his innocence or through the potential impeachment of any [C]ommonwealth witness." The trial court sustained this motion on August 18, 1980.

At trial, the prosecution called eight witnesses to prove the charges against Petitioner. The prosecution's final witness was Darrell Skaggs, the individual who helped Petitioner and his brother push the car into the alley. During the direct examination of Skaggs by the prosecutor, Skaggs was asked if he had any conversation with any of the defendants. At that point, Skaggs, over objection of defense counsel, testified that Petitioner "said that they had broken into a house down the road."

At the conclusion of the direct examination, defense counsel, at a hearing at the bench, moved for a mistrial because he was denied the production of this oral statement. However, the trial court overruled the motion for mistrial.

Skaggs was then cross-examined by Petitioner's trial counsel. During this cross-examination, Skaggs testified that he was interviewed by the prosecution, Mr. Polk, for twenty or thirty minutes. During this interview, Mr. Polk jotted notes down on a yellow sheet of paper.

At that point, Petitioner's trial counsel, at a bench conference, again requested disclosure of the notes. Defense counsel also requested that the trial court make an in-camera inspection of the notes. After the trial court inspected the notes, the trial court ruled that the defense was "not entitled to them".

The cross-examination of Skaggs then continued. During this cross-examination, the following colloquy occurred between Skaggs and counsel for Petitioner:

> *Q.25 Did he [Johnny] seem upset about that, in your opinion?*
>
> *A. No sir, not really.*
>
> *Q.26 He freely answered your question?*
>
> *A. Yes sir.*
>
> *Q.27 Did you notice anything about the physical appearance of Mr. Capps that was unusual?*

A. No sir.

Q.28 Was he speaking slow or quickly?

A. I think he was speaking just about right I guess.

Q.29 Had you ever seen Mr. Capps before that particular time?

A. No sir.

Q.30 So based upon your observation of him at that particular time you wouldn't know if he was acting abnormal or not, would you?

A. No sir.

At the conclusion of the cross-examination, defense counsel renewed their motion for production of the notes. However, the trial court overruled the motion and placed the one page of notes in the record for appellate purposes. (Appendix, Page A-14.)

The yellow page of notes that Mr. Polk took down were sketchy and not verbatim sentences as the trial court said. However, this page of notes contained these highly material statements:

Both drinking
-Small one had blue ribbon
-More intoxicated than small one (A.18).

Appellants submit that the failure of the trial court to disclose these notes, which contained the exculpatory evidence that Appellants had been drinking denied them

due process of law. Three theories justify a reversal of Appellants' convictions.

This court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that:

> *. . .[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id., 83 S.Ct. 1196-1197.*

It must be remembered that Appellants had the defense of intoxication; i.e., they did not have the capacity to form the requisite intent to commit the charged offenses. Skaggs was the only person that saw Appellants and communicated with them for any length of time. The evidence from this witness was highly relevant and material to Appellants' defense. Appellants were entitled to this exculpatory evidence to conduct their defense.

Since the decision in Brady, numerous cases have attempted to elucidate the scope of pretrial discovery mandated by due process. These cases have made it clear that:

> *. . .Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence. Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968).*

The use for impeachment purposes is the second reason why reversal is required.

In the case at bar, Skaggs testified that he saw nothing unusual about the physical appearance of Petitioner; that his speech was alright. Obviously, the information that Skaggs stated Petitioner had been drinking was inherently significant in assessing the credibility of the witness against them. Access to such information would have guaranteed the Petitioner far more effective cross-examination of Skaggs since he would have been able to respond to the witness' denial that there was anything abnormal with the way Petitioner was acting. The information sought was necessary to the conduct of Petitioner's defense.

"[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue v. Illinois, *360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id. It makes no difference that the false testimony goes only to the witness' credibility, or that the prosecutor did not intentionally fail to correct the false testimony. Id.*

In the case at bar, Skaggs was interviewed by Mr. Polk. Mr. Polk was present in court when Skaggs testified that he noticed nothing unusual in the physical appearance of Petitioner. He remained silent even though Skaggs, in the statement, stated that Petitioner had been drinking and was intoxicated (Appendix, Page A-14). This evidence was such to give rise to a reasonable inference that the testimony of Skaggs was false, and therefore, failure to disclose the information constituted reversible error. Williams v. Commonwealth, *Ky., 569 S.W.2d 139, 144 (1978).*

Again, it must be remembered that Appellants' defense was intoxication. The only disinterested witness to mention the work "intoxication" was Skaggs, and this information was not disclosed to Petitioner during the trial. This false testimony could very well "have affected the judgment of the jury." Giglio v. United States, *405 U.S. 150, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).*

One final comment must be made. The trial court inspected the notes and took possession of it. Yet, the trial court also remained silent when this false testimony was given by Skaggs. This violated the trial court's unique obligation to the administration of justice.

See United States v. Cuthbertson, 511 F.Supp. 375 (1981), *wherein it stated:*

> . . .The Court, unlike the prosecution, is not an adversary party in the proceedings. It sits neither to prove guilt nor establish innocence; but merely to maintain a fair trial. It is almost inconceivable that a court, possessing exculpatory information, must remain silent when the prosecution possessing identical information would be compelled to speak.

Inasmuch as the conduct of the prosecutor and the trial court was in apparent conflict with the decision of this court, and further the highest court of the Commonwealth having condoned the improper conduct by affirming without reference to this issue, (although the issue was presented by the Petitioner), the Petitioner respectfully submits that this court should grant a writ of certiorari to consider the alleged improper conduct of the prosecutor and the trial court in this action.

CONCLUSION

For all of the aforementioned reasons, the Petitioner, Johnny Lawrence Capps respectfully requests that this Court grant a Writ of Certiorari to review this case.

This the 16th day of June, 1982.

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APPENDIX

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RENDERED DATE: February 16, 1982
Not To Be Published

SUPREME COURT OF KENTUCKY
81-SC-192-MR
81-SC-193-MR

WILLIAM ORVILLE CAPPS, and
JOHNNY LAWRENCE CAPPS — APPELLANTS

V. APPEAL FROM HENDERSON CIRCUIT COURT
HON. CARL D. MELTON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING IN PART

AFFIRMING IN PART

William Capps and his brother, Johnny, appellants, were each convicted of first degree burglary and theft by unlawful taking. Each was sentenced to ten years for burglary and two years for theft. They were then convicted as first degree persistent felony offenders, and their sentences were enhanced to twenty years for burglary and ten years for theft. Their appeals are before us as a matter of right.

Sometime after 7:00 p.m. on June 16, 1980, Mrs. Jolene Buley was mowing the grass in her yard. When she went around to the front of her house she saw a

strange car parked in the driveway. She noticed that the front door of her house was open. The car was an older model white Chevrolet with a McLean County license. The motor of the car was running and Mrs. Buley saw certain items of her family's personal property inside the vehicle. She turned off the motor, removed the keys, and she and her son went to an outbuilding and called the sheriff. When he arrived, Mrs. Buley gave him the keys she had removed and described the car, in detail. Brian Buley, her son, witnessed two men leaving his home and his description matched that of appellants. Within ten to fifteen minutes of leaving the Buley residence, a deputy sheriff proceeded to a location about one and one-half miles from the Buley residence where he located the same automobile parked off the main road. Appellants were standing near the vehicle and they matched the description of the two men given by Brian Buley. The sheriff identified the Buley's personal property in the car and he used the keys removed by Mrs. Buley to start the car. It is beyond doubt that appellants committed the burglary and the theft.

Both appellants testified in their own behalf. Johnny Capps presented the defenses of insanity and intoxication. William Capps also pled intoxication. Following

both the close of the Commonwealth's evidence and that of appellants', motions for a directed verdict of acquittal were denied by the trial court.

Although appellants raise seventeen allegations of error, we will discuss only those that have any merit.

I. DID THE TRIAL COURT ERR IN OVERRULING APPELLANTS' MOTION FOR A DIRECTED VERDICT?

The basis of this argument is the appellants' claim that there was "overwhelming" evidence that both appellants were intoxicated at the time of the commission of the crimes and therefore did not have the requisite intent to commit crimes.

Johnny Capps, by his own testimony and the testimony of a psychologist and a psychiatrist, established that he had a long-standing drinking problem. The two experts testified that, if Johnny were under the influence, he would not be able to "control his impulsiveness" and would be unable "to understand his own actions or his wrongness." However, witnesses for the Commonwealth testified that shortly after the crime Johnny was speaking well and appeared normal. Moreover, Johnny admitted he knew he was doing something wrong.

William attempted to show, by his testimony and by that of a psychiatrist, that he was an alcoholic. He also testified that he did not remember anything about

being at the Buley residence and committing the crimes. The Commonwealth's evidence rebutted William's testimony that he was intoxicated at the time.

In the final analysis, the jury, after hearing the conflicting testimony as to intoxication of both appellants, chose to believe that of the Commonwealth. We cannot say that the evidence presented was of such nature as to require a directed verdict. Under these circumstances the trial court was correct in denying a directed verdict. Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977).

II. DID THE TRIAL COURT ERR IN FAILING TO GIVE A SEPARATE INSTRUCTION ON VOLUNTARY INTOXICATION?

At the close of the testimony, appellants tendered an instruction on the defense of intoxication. The trial court refused to give a separate instruction, but did incorporate the defense in the instructions which delineated the elements necessary to sustain a conviction of burglary and theft. Following a listing of those requirements the trial court instructed the jury that in order to convict each appellant it was necessary for the jury to find, "That he was not so drunk that by reason of his drunkenness he did not have a conscious intention to commit [the named crimes]."

Appellants argue that the placing of the intoxication instruction within the body of the so-called "offense" instruction was error. It is argued that a separately located instruction is required. Pace v. Commonwealth, Ky., 561 S.W.2d 664 (1978) is cited as authority for that proposition. We do not agree. In Pace, the appellant, in defending a murder charge, claimed that the evidence justified the giving of an instruction on accidental killing and also one on self-protection. The trial court refused to give a separate, complete instruction on self-protection and simply added, in the manslaughter offense instruction, that before the jury could find her guilty they would have to find that, when she shot the victim, "in so doing she was not privileged to act in self-protection." Id., at 668. In declaring the trial court in error, a majority of this Court found that the evidence did require the giving of a complete and proper instruction on self-protection and further ruled that the reference made in the offense instruction "was not adequate in this regard." The reference given was described as "straddling the fence", and, because it did not completely define the law; the trial court had erroneously "left it up to the jury to determine the law." Id. The decision was based on the content of the instruction and not its location. It was simply unclear.

In the case at bar, the instruction properly places the burden on the Commonwealth to prove that the appellants were not drunk. It expresses the essence of the intoxication statute, KRS 501.080(1), and its placement in the offense instruction called the attention of the jury to all elements of the crime and the resulting burden of proof on the Commonwealth. We find no error or prejudice here.

III. DID THE TRIAL COURT ERR WHEN IT REFUSED TO GIVE AN INSTRUCTION ON SECOND DEGREE BURGLARY WHICH REFLECTED A LEGISLATIVE CHANGE OF PUNISHMENT?

The date appellants committed the burglary was June 18, 1980. On that date, KRS 511.020 read in pertinent part as follows: "A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling. . . ." The offense was declared to be a Class B felony and carried a punishment of ten to twenty years' imprisonment. On July 15, 1980, before appellants were indicted, burglary of a dwelling became a second degree burglary, under KRS 511.030, which defines the offense as a Class C felony, and the sentence was reduced to a period of five to ten years.

At the trial, appellants tendered a second degree burglary instruction which reflected the change in the statute. Citing the fact that the crimes were committed

while the old statute was in effect, the trial court refused the instruction.

Appellants argue that the trial court erred, in view of KRS 446.110:

> 446.110. OFFENSES COMMITTED AND RIGHTS ACCRUING PRIOR TO REPEAL OF LAW.
>
> No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accured or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment after the new law takes effect. (Emphasis added)

It is argued that since the penalty was mitigated by the amendment, and since appellants had "consented" to such a mitigated penalty by virtue of their intended instructions, the statute requires the lesser penalty to be given. We agree.

KRS 446.110 was enacted to abrogate the old common law rule which held that the repeal of a statute by the legislature also repealed the power of the courts to enforce penalties enacted thereunder. Commonwealth

v. Louisville & N. R. Co., Ky., 215 S.W. 938 (1919); Acree & Kinman v. Commonwealth, Ky., 13 Bush 353, (1877). Moreover the statute, in its last sentence, provides that when a subsequent statute provides that the previous punishment is mitigated, the defendant is entitled to the benefit of said lesser punishment. Kinser v. Commonwealth, Ky., 205 S.W. 951 (1918). In Coleman v. Commonwealth, Ky., 169 S.W. 595 (1914), we said that it would be less confusing and less uncertain if the statute in force when the offense was committed were followed. However, KS 465 (the predecessor of KRS 446.110), provides that if the punishment provided in the second statute "definitely" mitigates that in the first statute, and if the defendant consents, the judgment should be given under the new law. In commenting on the last sentence of the statute, we said in Coleman that it:

> *only applies to states of case in which the penalty, forfeiture, or punishment is definitely mitigated by the provisions of the new law, and that, when it is so mitigated, the defendant can only avail himself of its provisions by consenting that judgment may be pronounced under the new law. . . Id., at 597.*

In the case at bar, it is clear that the punishment of the crime was reduced from a range of ten to twenty years to a range of five to ten years by the statute which became effective on July 15, 1980, some time

after the commission of the crime. Moreover, not only did the appellants consent to trial under the new statute, they specifically requested an instruction incorporating the mitigated punishment of the new statute. The factual situation here is precisely within the ambit of the statute. See also, Earl v. Commonwealth, Ky., 261 S.W. 239 (1924).

Under these circumstances, we hold that the trial court erred in refusing to grant such instruction. In the event of a new trial, appropriate instructions will be given.

The burglary convictions and the persistent felony convictions, based thereon, are hereby reversed. The convictions of theft by unlawful taking are affirmed, and the persistent felony convictions, based thereon, are affirmed. The case is remanded to the trial court with instructions to enter judgment in conformity with this opinion.

All concur.

ATTORNEYS FOR APPELLANTS:

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SUPREME COURT OF KENTUCKY
81-SC-193-MR

JOHNNY LAWRENCE CAPPS — *APPELLANT*

V. *APPEAL FROM HENDERSON CIRCUIT COURT*
HONORABLE CARL D. MELTON, JUDGE
Ind. No. 80-CR-069

COMMONWEALTH OF KENTUCKY — *APPELLEE*

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED April 20, 1982.

_____
Chief Justice

HENDERSON CIRCUIT COURT
INDICTMENT NO. 80-CR-069

COMMONWEALTH OF KENTUCKY *PLAINTIFF*

VS. *JUDGMENT OF CONVICTION AND SENTENCE*

JOHNNY LAWRENCE CAPPS *DEFENDANT*

The defendant, Johnny Lawrence Capps, having this day appeared in open court with his attorney, Hon. Thomas L. Duke, and Hon. Ulvester Walker and William F. Polk, Jr., having appeared as attorney for the Commonwealth, for the purpose of (a) the court's consideration of the presentence investigation report of the defendant, and (b) the court's fixing of punishment and imposition of sentence upon the defendant; and the jury having heretofore on October 4, 1980 returned its verdict finding the defendant guilty and fixing his punishment in conformity with the court's instructions, which said verdict was on said date duly accepted by the Court by order duly entered; and the Court having duly considered the contents of the presentence investigation report made of the defendant by the Probation Officer and having permitted the defendant and his counsel to review and fully acquaint themselves with the contents of said report in its entirety, and no request having been made by defendant or his counsel to controvert the factual contents or conclusions of the presentence investigation report;

and the Court having fully considered the possibility of probation and conditional discharge of the defendant and after due consideration of the nature and circumstances of the crime(s) and the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the public because:

(a) there is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution;

(c) a disposition of the defendant upon probation or conditional discharge will unduly depreciate the seriousness of the defendant's crime; and

(d) the statutory provisions prohibit the Court from granting probation or conditional discharge by reason of the first-degree persistent felony offender charges;

and the Court having inquired of the defendant and his counsel whether they had any legal cause to show why judgment and sentence should not be pronounced against the defendant; further, the Court having afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of the punishment and no legal cause having been shown why judgment and sentence should not be pronounced against him in accordance with the jury's verdict, it is therefore ORDERED AND ADJUDGED by the Court as follows:

That the defendant, Johnny Lawrence Capps, is guilty of the offense of first-degree burglary committed on or about June 18, 1980 and being a first-degree persistent felony offender as charged in Count I of the indictment and his punishment therefor is fixed at imprisonment for an indeterminate term of twenty (20) years; accordingly, he is hereby sentenced to and ordered committed to the custody of the Department of Corrections for a term of twenty (20) years and until released in accordance with law.

That the defendant, Johnny Lawrence Capps, is guilty of the offense of theft by unlawful taking of property of the value of $100.00 or more committed on or about June 18, 1980 and being a first-degree persistent felony offender as charged in Count III of the indictment and his punishment therefor is fixed at imprisonment for an indeterminate term of ten (10) years; accordingly, he is hereby sentenced to and ordered committed to the custody of the Department of Corrections for a term of ten (10) years and until released in accordance with law.

It is further ordered and adjudged that the foregoing ten (10) year sentence imposed upon the defendant under Count III of the indictment shall run consecutive to and begin at the expiration of the twenty (20) year sentence imposed upon the defendant under Count I of the indictment.

It is further ORDERED and ADJUDGEd that the Sheriff of Henderson County shall deliver the defendant to the custody of the Department of Corrections at his earliest convenience at such location within this state as the Department shall designate for the purpose of the defendant's executing the sentence(s) imposed upon him hereunder, and the defendant is now remanded to the custody of the County Jail, there to remain and be securely kept, until he can be transported to the custody of the Department of Corrections as hereinbefore provided.

Pending appeal defendant shall be entitled to bail in the amount of $7,500.00.

ENTERED this the 13th day of October, 1980.

_____
JUDGE,
HENDERSON CIRCUIT COURT

Notice of entry of the above and foregoing Judgment of Conviction and Sentence was this day served upon the parties of record by mailing, postage prepaid, true copies thereof to the following attorneys of record (at the post office addresses shown) as follows:

Hon. Ulvester Walker
210 Third Street
Henderson, KY 42420

Hon. Thomas L. Duke
203 West Fourth Street
Owensboro, KY 42301

Hon. Henry M. Bugay
227 St. Ann Street
Owensboro, KY 42301

This the 14th day of October, 1980.

George T. Raber, Clerk

By: _____ *D.C.*

DARREL SKAGGS

- *Said lost keys*
  - *Push & ride to O'boro, hot wire*
- *Both drinking*
- *Small one had blue ribbon*
  - *More intoxicated than small one*

at time Ron Perdue came up

- *Large one admitted breaking into house down the road*
  - *small one denied it*

- *Jim Buley said Tony K. McCurry pushed truck*

Court's Exhibit No. 1

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

532.080 PERSISTENT FELONY OFFENDER SENTENCING

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from the proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

(2) A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

2. Was on probation or parole from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted.

(3) A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after

having been convicted of two (2) or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on any of the previous felony date of the commission of the felony for which he now stands convicted; or

2. Was on probation or parole from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted.

(4) For the purpose of determining whether a person has two (2) of more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

(5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation or conditional discharge.

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted is a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty years nor more than life imprisonment; or

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten years nor more than twenty years.

(7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years.

HISTORY: 1978 S 69, eff. 6-17-78
1976 ex s, S 15, §474; 1976 S 270, §1; 1974 232, §280

CROSS REFERENCES

See Brickey, Kentucky Criminal Law §28.03, 29.04, 29.07(1)

See Murrell, Kentucky Criminal Practice §17.04

No. 81-2308

Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHNNY LAWRENCE CAPPS - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - - Respondent

On Petition for Writ of Certiorari to
The Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Petitioner's constitutional right of due process was violated by trying Petitioner under Kentucky's Persistent Felon Statute which does not allow for the introduction of "mitigating" evidence.

II.

Whether the Prosecutor or Trial Court violated Petitioner's constitutional right if due process by failing to provide Petitioner with a piece of "exculpatory" evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-2308

October Term, 1981

JOHNNY LAWRENCE CAPPS - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent, Commonwealth of Kentucky, respectfully prays that Mr. Capp's petition for writ of certiorari be denied.

OPINION BELOW

Petitioner was adjudged guilty of first degree burglary and theft by unlawful taking of property of a value greater than $100.00 by judgment of the Henderson Circuit Court entered October 13, 1980. In this same judgment, Petitioner was found to be a first degree persistent felony offender thus causing his original sentences to be enhanced to twenty and ten years, respectively. (Transcript of Record, TR 340-341)

The Supreme Court of Kentucky reversed Petitioner's conviction for first degree burglary and the accompanying persistent felon enhancement. The felony theft conviction and the persistent felon conviction based thereon were affirmed. The Court's opinion did not discuss the issues presented by this petition, the Court stating that all issues not discussed were without merit. (See Appendix)

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257(3). The Commonwealth submits that Petitioner's constitutional rights have not been violated and he has not presented a case worthy of constitutional review.

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT

SEC. 1

". . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW;"

COUNTERSTATEMENT OF THE CASE

The Respondent, Commonwealth of Kentucky (Commonwealth), will briefly delineate only the facts of this case strictly relevant to the questions presented.

Prior to his trial, Petitioner moved to discover exculpatory evidence which either indicated Petitioner's innocence or potentially impeached a prosecution witness. (Transcript of Record, TR, 12-13)

At trial, Darrell Skaggs testified that Petitioner and his accomplice flagged him down as he drove along U.S. 60 on the day of the crime. Skaggs stated that he had never seen Petitioner before but nonetheless helped push Petitioner's stalled vehicle off the main highway while Petitioner steered. Skaggs recalled that Petitioner told him that Petitioner and his accomplice had just burglarized a house up the highway. (Transcript of Evidence, TE, Vol. III, 325-333)

Defense counsel then requested that the prosecutor turn over a piece of paper which contained some notes the prosecutor had apparently jotted down in his pretrial interview of Skaggs. The trial judge examined the paper, noted that the notes were sketchy and unsigned and ruled Petitioner had no right to their disclosue. (TE, Vol. III, 338-348) The notes were placed in the record nonetheless.

In the persistent felon phase of the trial, the prosecution proved that Petitioner was over twenty-one years of age at the time of the crimes, that he had four prior felony convictions, and that he had been discharged from at least one of the convictions in the last five years. (TE, Vol. VI, 829-850) The trial court ruled that Petitioner could not introduce "mitigating" evidence in the persistent felon phase of the trial, but Petitioner was allowed to recite the substance of the mitigating evidence he wished to introduce during his opening statement. (TE, Vol. VI, 809-814) The evidence itself was later placed in the record by avowal. (TE, Vol. VII, 940-974)

Other facts will be noted as necessary in the appropriate argument.

REASONS FOR DENYING THE WRIT

I.

The Kentucky Persistent Felony Offender Statute Is Not Unconstitutional and Petitioner Had No Constitutional Right to Introduce Evidence Concerning His Personal Circumstances.

Petitioner contends that the trial court, pursuant to the Kentucky persistent felon statute, KRS 532.080, violated his constitutional right of due process by refusing to allow him to introduce "mitigating" evidence, that is, evidence concerning Petitioner's personal circumstances. Petitioner challenges both the trial court's decision and the constitutionality of the statute. Neither contention has merit.

This Court has long recognized the validity of persistent felon statutes such as employed in Petitioner's case, most recently in *Rummel* v. *Estelle,* 445 U. S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). As Kentucky courts have noted the only issue in a persistent felon trial is whether or not the defendant has attained the status prescribed by the statute. *White* v. *Commonwealth,* Ky. App., 611 S. W. 2d 529 (1980); cert. denied by U. S. Supreme Court, 452 U. S. 966. (Appendix) Thus, the only evidence which the defense can introduce is evidence which infers that the defendant was not of age, had not been convicted of prior felonies or had not been discharged in the last five years. Evidence that the defendant might be of fine

character in the eyes of some persons is totally irrelevant and therefore inadmissible. *White, supra.*

Petitioner's reliance on *Eddings* v. *Oklahoma,* ___ U. S. ___, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), and the companion cases of *Lockett* v. *Ohio,* 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Bell* v. *Ohio,* 438 U. S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978), is misplaced. All three are limited holdings involving death penalty proceedings in which the prosecution had to show aggravating circumstances. The Court in *Eddings* discussed the *"Lockett* rule" extensively and noted that the rule allowing the introduction of mitigating evidence in death penalty cases arises from the "profound" differences between death and other penalties. (102 S. Ct. 869, 874) The above opinions simply do not go as far as Petitioner would wish. The Commonwealth submits that this Court's obvious recognition of the limitations of the *Lockett* rule is as sound as the rationale behind the rule.

Petitioner's claim is not a sufficient ground for review by this Court.

II.

There Was No Error of Due Process in the Nondisclosure of the Prosecutor's Notes of His Interview with Darrell Skaggs.

Petitioner contends that he was denied due process of law because the prosecutor's notes jotted down in an interview with Darrell Skaggs were not made available for his discovery. His contention apparently encompasses three related alleged violations:

1. the prosecutor failed to release exculpatory evidence despite Petitioner's timely request;
2. the trial judge failed to allow Petitioner to examine the Prosecutor's notes although they contained exculpatory information; and
3. the Petitioner was consequently unable to set forth evidence relevant to his defense and Skagg's credibility.

This issue was found to be meritless by the Supreme Court of Kentucky which did not explain its decision (Appendix).

This issue presents two separate but related aspects of the law which must be considered. First, was the prosecutor required under the rules of procedure to produce these notes before Petitioner cross-examined Skaggs? Second, did the notes contain exculpatory information which the prosecutor and the trial court were obliged to reveal?

Under Kentucky Rule of Criminal Procedure 7.26, as amended, the defense is able to discover notes made pursuant to an interview of a witness if the notes have been signed or initialed by him, or they are or purport to be a substantially verbatim statement by him. This rule is quite similar to the applicable federal rule, 18 U.S.C. 3500(e), which this Court has acknowledged as sound. *Goldberg* v. *United States*, 425 U. S. 94, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976).

The notes taken by the prosecutor in regard to his interview of Skaggs met neither the criteria of Ky. RCr 7.26 nor the definition of "statement" as set forth

in the analogous federal statute. (See Transcript of Evidence, TE, Vol. III, 341-348, and Court's Exhibit #1) The trial court's determination was correct as a matter of state procedural law and should not be disturbed. *Patterson* v. *New York,* 432 U. S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

Thus, the prosecutor was not compelled under the rules of procedure to disclose the notes of his interview with Skaggs—in fact the rules prohibited him from doing so. But it must also be considered whether the notes contained evidence of an exculpatory nature which the prosecution was compelled to disclose in any circumstance.

Respondent feels that some prefatory remarks are in order before discussing the case law. Petitioner's defense was based upon both intoxication and insanity. There was a great deal of evidence indicating that he was a chronic alcoholic who had been in trouble with the law before as a result of his drinking. The defense examined several experts concerning the effects of chronic alcoholism. The experts generally agreed that although the chronic alcoholic usually requires more liquor than the average person to become thoroughly intoxicated, the chronic alcoholic in that state might certainly be unable to know what he is doing. Petitioner himself testified that he had been drinking heavily at the time of the crime, *but,* he knew he was doing something wrong and was conscious that he was carrying a lot of "stuff" out of the Buley's residence, although he could not explain his actions. (TE, Vol. III, 398-403, 458). The arresting officer also testified

that it was apparent Petitioner and his accomplice had been drinking but that it did not seem to substantially affect their behavior. (TE, Vol. V, 660-689). As the Supreme Court of Kentucky noted, the jury was properly instructed that they must believe Petitioner guilty of the crime beyond a reasonable doubt *and*, "That he was not so drunk that by reason of his drunkenness he did not have a conscious intention to commit [the named crimes]". (See Appendix.) The jury's verdict indicates that they did not believe Petitioner was so drunk that he lacked the ability to form the requisite intent.

This Court long ago recognized that it is improper for the prosecutor or the trial judge to suppress evidence favorable to the accused. *Brady* v. *Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Since then the Court has given the *Brady* holding definition, most relevantly in *United States* v. *Agurs*, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

The import of the *Agurs* decision was recently well explained by the Fifth Circuit in *United States* v. *Mesa*, 660 F. 2d 1070 (5th Cir., 1981). See also *United States* v. *Irwin*, 661 F. 2d 1063 (5th Cir., 1981). The Court of Appeals stated in *Mesa, supra*, as follows:

> ". . . In *United States* v. *Agurs*, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Court recognized three distinct types of situations in which the *Brady* doctrine applies and enumerated standards for determining materiality in each circumstance. First, where the prosecutor knows or should know that the conviction is based on

false testimony, a new trial is mandated if there is a reasonable likelihood that the false testimony could have effected the jury verdict. Second, if there is no disclosure of information despite a specific defense request, the test is whether the suppressed evidence might have affected the outcome of the trial. Finally, in the event of a general request for *Brady* material or no request at all, a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, creates a reasonable doubt that did not otherwise exist. This circuit recognizes yet another circumstance in which *Brady* controls: when the prosecutor fails to disclose purely impeaching evidence not affecting a substantive issue and absent a specific defense request, relief will be granted only if the defendant can demonstrate that the undisclosed evidence probably would result in an acquittal. . . ." (p. 1076)

In the case at bar the prosecutor's note suggests that Skaggs thought Petitioner and his accomplice had been drinking. The question is whether this evidence is in some way exculpatory such that the prosecutor and the trial judge had an affirmative duty to give this information to defense counsel. Petitioner argues that such a duty did exist because of two factors, both of which can be analyzed under *Mesa*.

Petitioner argues first that had the defense known that Skaggs told the prosecutor that Petitioner and his accomplice appeared to have been drinking, defense counsel would have had a piece of evidence to introduce that would probably have made a difference in

the outcome. The Commonwealth can only speculate why defense counsel did not ask Skaggs directly whether Petitioner appeared intoxicated. Nonetheless, there was a great deal of evidence otherwise introduced to indicate Petitioner had been drinking—that fact was even acknowledged by the arresting officer.

The *Mesa* court, in its analysis of *Agurs, supra,* noted that the focus in such cases is on materiality which must be analyzed in view of the circumstances. Of the three analytic bases set forth in *Agurs,* the third seems most appropriate for application in this case, that is, would the omitted evidence, in light of the entire record, have created a reasonable doubt that did not otherwise exist? It is submitted that it did not and the evidence was therefore immaterial. Petitioner seems to forget that the trial court apparently agreed that there was sufficient evidence that he had been drinking to allow the defense to go to the jury—an instruction was given. The critical issue was not whether Petitioner was intoxicated but whether his condition rendered him unable to form the requisite criminal intent. Another bit of evidence that he had been drinking would have been cumulative, but not material to this critical issue. Evidence that Petitioner was able to carry on a discussion, steer a car off the road, answer the police officer's questions correctly, get a lot of "stuff" out of a strange house, drive from one town to another, could realize that when he took the "stuff" he knew he was doing something wrong—evidence of Petitioner's words, deeds and mental impressions at the time of the crime which

are probative of the critical issue are material. The revelation of the notes would not have created a reasonable doubt otherwise not present and the outcome would have been no different.

Petitioner also contends that the information in the notes was exculpatory because it could have been used to impeach Skagg's testimony. The colloquy he cites on pages 15-16 of the petition was not the giving of false testimony. The answers were straightforward responses to the questions asked and were consistent with the rest of the testimony. Petitioner argues that it created an impression of his condition at the time which the prosecutor knew to be false and thus impeachable. The Commonwealth submits that the cited dialogue is innocuous. Ironically, Petitioner argues here that Skaggs was lying about Petitioner's outward condition by this testimony, while at trial the defense took pains to elicit expert testimony to the effect that a chronic alcoholic might appear totally normal while being in fact thoroughly intoxicated (Note Q. and A. "30" closely).

The *Mesa* Court's opinion does not address this exact circumstance but for good reason. Skagg's testimony was not impeachable because nothing in his testimony, or in that of the other witnesses, was necessarily inconsistent with the fact that Petitioner probably had been drinking. Herein lies the fallacy of Petitioner's reasoning throughout this case. He wishes this Court to find, as he did the courts below, that if he was drunk he is innocent of the crimes. However, the defense of intoxication is not that simple. If it

were, chronic alcoholics would be excused automatically as a matter of law from criminal acts committed while intoxicated.

This Court should not grant review of Petioner's case on the basis of this issue. The Petition does not present a sufficient case of constitutional violation and there has been no showing that any opinion of this Court has been misconstrued by the Supreme Court of Kentucky.

CONCLUSION

WHEREFORE, the Respondent, Commonwealth of Kentucky, prays that the Court not issue a writ of certiorari to review this case as Petitioner has not stated a sufficient basis for review pursuant to Rule 17(1)(b).

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of July, 1982, I served the petitioner with Respondent's Brief in Opposition to Petition for Certiorari by placing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Hon. David W. Lamar, 422 Frederica Street, Owensboro, KY 42301, Counsel for Petitioner.

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APPENDIX

RENDERED DATE—FEBRUARY 16, 1982
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

81-SC-192-MR
81-SC-193-MR

WILLIAM ORVILLE CAPPS, and
JOHNNY LAWRENCE CAPPS - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henderson Circuit Court
Hon. Carl D. Melton, Judge

MEMORANDUM OPINION OF THE COURT
REVERSING IN PART
AFFIRMING IN PART

William Capps and his brother, Johnny, appellants, were each convicted of first degree burglary and theft by unlawful taking. Each was sentenced to ten years for burglary and two years for theft. They were then convicted as first degree persistent felony offenders, and their sentences were enhanced to twenty years for burglary and ten years for theft. Their appeals are before us as a matter of right.

Sometime after 7:00 p.m. on June 16, 1980, Mrs. Jolene Buley was mowing the grass in her yard. When she went around to the front of her house she saw a strange car parked in the driveway. She noticed that the front door of her house was open. The car was an older model white Chevrolet with a McLean County license. The motor of the

car was running and Mrs. Buley saw certain items of her family's personal property inside the vehicle. She turned off the motor, removed the keys, and she and her son went to an outbuilding and called the sheriff. When he arrived, Mrs. Buley gave him the keys she had removed and described the car, in detail. Brian Buley, her son, witnessed two men leaving his home and his description matched that of appellants. Within ten to fifteen minutes of leaving the Buley residence, a deputy sheriff proceeded to a location about one and one-half miles from the Buley residence where he located the same automobile parked off the main road. Appellants were standing near the vehicle and they matched the description of the two men given by Brian Buley. The sheriff identified the Buley's personal property in the car and he used the keys removed by Mrs. Buley to start the car. It is beyond doubt that appellants committed the burglary and the theft.

Both appellants testified in their own behalf. Johnny Capps presented the defenses of insanity and intoxication. William Capps also pled intoxication. Following both the close of the Commonwealth's evidence and that of appellants', motions for a directed verdict of acquittal were denied by the trial court.

Although appellants raise seventeen allegations of error, we will discuss only those that have any merit.

I. DID THE TRIAL COURT ERR IN OVERRULING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT?

The basis of this argument is the appellants' claim that there was "overwhelming" evidence that both appellants were intoxicated at the time of the commission of the crimes and therefore did not have the requisite intent to commit crimes.

Johnny Capps, by his own testimony and the testimony of a psychologist and a psychiatrist, established that he had a long-standing drinking problem. The two experts testified that, if Johnny were under the influence, he would not be able to "control his impulsiveness" and would be unable "to understand his own actions or his wrongness." However, witnesses for the Commonwealth testified that shortly after the crime Johnny was speaking well and appeared normal. Moreover, Johnny admitted he knew he was doing something wrong.

William attempted to show, by his testimony and by that of a psychiatrist, that he was an alcoholic. He also testified that he did not remember anything about being at the Buley residence and committing the crimes. The Commonwealth's evidence rebutted William's testimony that he was intoxicated at the time.

In the final analysis, the jury, after hearing the conflicting testimony as to intoxication of both appellants, chose to believe that of the Commonwealth. We cannot say that the evidence presented was of such nature as to require a directed verdict. Under these circumstances the trial court was correct in denying a directed verdict. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530 (1977).

II. DID THE TRIAL COURT ERR IN FAILING TO GIVE A SEPARATE INSTRUCTION ON VOLUNTARY INTOXICATION?

At the close of the testimony, appellants tendered an instruction on the defense of intoxication. The trial court refused to give a separate instruction, but did incorporate the defense in the instructions which delineated the elements necessary to sustain a conviction of burglary and theft. Following a listing of those requirements the trial court instructed the jury that in order to convict each ap-

pellant it was necessary for the jury to find, "That he was not so drunk that by reason of his drunkenness he did not have a conscious intention to commit [the named crimes]."

Appellants argue that the placing of the intoxication instruction within the body of the so-called "offense" instruction was error. It is argued that a separately located instruction is required. *Pace* v. *Commonwealth*, Ky., 561 S. W. 2d 664 (1978) is cited as authority for that proposition. We do not agree. In *Pace*, the appellant, in defending a murder charge, claimed that the evidence justified the giving of an instruction on accidental killing and also one on self-protection. The trial court refused to give a separate complete instruction on self-protection and simply added, in the manslaughter offense instruction, that before the jury could find her guilty they would have to find that, when she shot the victim, "in so doing she was not privileged to act in self-protection." *Id.*, at 668. In declaring the trial court in error, a majority of this Court found that the evidence did require the giving of a complete and proper instruction on self-protection and further ruled that the reference made in the offense instruction "was not adequate in this regard." The reference given was described as "straddling the fence", and, because it did not completely define the law; the trial court had erroneously "left it up to the jury to determine the law." *Id.* The decision was based on the content of the instruction and not its location. It was simply unclear.

In the case at bar, the instruction properly places the burden on the Commonwealth to prove that the appellants were not drunk. It expresses the essence of the intoxication statute, KRS 501.080(1), and its placement in the offense instruction called the attention of the jury to *all elements of the crime* and the resulting burden of proof on the Commonwealth. We find no error or prejudice here.

III. DID THE TRIAL COURT ERR WHEN IT REFUSED TO GIVE AN INSTRUCTION ON SECOND DEGREE BURGLARY WHICH REFLECTED A LEGISLATIVE CHANGE OF PUNISHMENT?

The date appellants committed the burglary was June 18, 1980. On that date, KRS 511.020 read in pertinent part as follows: "A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling. . . ." The offense was declared to be a Class B felony and carried a punishment of ten to twenty years' imprisonment. On July 15, 1980, before appellants were indicted, burglary of a dwelling became a second degree burglary, under KRS 511.030, which defines the offense as a Class C felony, and the sentence was reduced to a period of five to ten years.

At the trial, appellants tendered a second degree burglary instruction which reflected the change in the statute. Citing the fact that the crimes were committed while the old statute was in effect, the trial court refused the instruction.

Appellants argue that the trial court erred, in view of KRS 446.110:

> 446.110. OFFENSES COMMITTED AND RIGHTS ACCRUING PRIOR TO REPEAL OF LAW.
>
> No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter shall conform, so far as practicable to the laws in

> force at the time of such proceedings. *If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.* (Emphasis added)

It is argued that since the *penalty* was mitigated by the amendment, and since appellant had "consented" to such a mitigated penalty by virtue of their tendered instructions, the statute requires the lesser penalty to be given. We agree.

KRS 446.110 was enacted to abrogate the old common law rule which held that the repeal of a statute by the legislature also repealed the power of the courts to enforce penalties enacted thereunder. *Commonwealth* v. *Louisville & N. R. Co.*, Ky., 215 S. W. 938 (1919); *Acree & Kinman* v. *Commonwealth*, Ky., 13 Bush 353, (1877). Moreover the statute, in its last sentence, provides that when a subsequent statute provides that the previous punishment is mitigated, the defendant is entitled to the benefit of said lesser punishment. *Kinser* v. *Commonwealth*, Ky., 205 S. W. 951 (1918). In *Coleman* v. *Commonwealth*, Ky., 169 S. W. 595 (1914), we said that it would be less confusing and less uncertain if the statute in force when the offense was *committed* were followed. However, KS 465 (the predecessor of KRS 446.110), provides that if the punishment provided in the second statute "definitely" mitigates that in the first statute, and if the defendant consents, the judgment should be given under the new law. In commenting on the last sentence of the statute, we said in *Coleman* that it:

> only applies to states of case in which the penalty, forfeiture, or punishment is definitely mitigated by the provisions of the new law, and that, when it is so

> mitigated, the defendant can only avail himself of its provisions by consenting that judgment may be pronounced under the new law. . . .
> *Id.*, at 597.

In the case at bar, it is clear that the punishment of the crime was reduced from a range of ten to twenty years to a range of five to ten years by the statute which became effective on July 15, 1980, some time after the commission of the crime. Moreover, not only did the appellants *consent* to trial under the new statute, they *specifically* requested an instruction incorporating the mitigated punishment of the new statute. The factual situation here is precisely within the ambit of the statute. See also, *Earl* v. *Commonwealth*, Ky., 261 S. W. 239 (1924).

Under these circumstances, we hold that the trial court erred in refusing to grant such instruction. In the event of a new trial, appropriate instructions will be given.

The burglary convictions and the persistent felony convictions, based thereon, are hereby reversed. The convictions of theft by unlawful taking are affirmed, and the persistent felony convictions, based thereon, are affirmed. The case is remanded to the trial court with instructions to enter judgment in conformity with this opinion.

All concur.

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COURT OF APPEALS OF KENTUCKY

JAMES MICHAEL WHITE, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

November 14, 1980

DISCRETIONARY REVIEW DENIED — March 3, 1981.

Defendant was convicted in the Christian Circuit Court, Stephen P. White, Jr., J., of trafficking in a controlled substance and of being a persistent felony offender, and he appealed. The Court of Appeals, Cooper, J., held that: (1) refusal to allow defendant to introduce mitigating evidence on charge of being a persistent offender was not violative of his rights to due process; (2) defendant did not have a constitutional right to inform jury about strict nonparole provisions contained in persistent offender statute; (3) response of Commonwealth that it had no written or recorded statements made by defendant, if misleading, was not attributable to actions of Commonwealth; (4) impartiality of proceedings was not tainted by misconduct of prosecutor during trial and in summation of evidence; (5) refusing to instruct jury on a lesser included offense during guilt phase of trial was not error; (6) error with respect to failure to prove defendant's age at time of offenses with respect to persistent offender charge was not preserved for review; and (7) restrictions of defendant's voir dire examination of jury panel did not deny defendant his basic right to a fair and impartial trial.

Affirmed.

1. Criminal Law, Key 1202(3)

Refusal to allow defendant to introduce mitigating evidence on charge of being a persistent felony offender was not error in that sole issue to be determined was that of status, that is, whether defendant met statutory definition of being a persistent felony offender, and character evidence was irrelevant and and immaterial to that determination in that it neither proved nor disproved status. KRS 532.080.

2. Constitutional Law, Key 270(4)

Defendant was not denied due process by reason of fact that trial court precluded him from informing jury about strict nonparole provision contained within persistent offender statute. KRS 532.080, 532.080(7); U.S.C.A. Const. Amend. 14.

3. Criminal Law, Key 1202(1)

The persistent offender stage of a trial is designed to avoid creating an unfair influence upon the question of the guilt or innocence of the defendant with respect to the current charge, but is not designed to provide a separate sentencing phase where mitigating or aggravating factors surrounding the charge can be presented. KRS 532.080.

4. Criminal Law, Key 982.1

Pardon and Parole, Key 1

Probation and parole are not constitutional rights, but, rather, are legislative clemencies granted as a matter of grace.

5. Criminal Law, Key 627.7(1)

Oral statements and conversations do not come within scope of discovery; only written statements and convictions are discoverable. RCr 7.24(2).

5. Criminal Law, Key 627.7(2)

The Commonwealth was not required to provide defendant with any and every oral statement he made to any of the witnesses involved; its response that it had no written or recorded statement made by the defendant was technically correct, and if the defendant was misled in that respect, it was not attributable to the actions of the Commonwealth. RCr 7.24(2).

7. Criminal Law, Key 730(1)

Defendant was not denied a fair and impartial trial as a result of the misconduct of the prosecutor both during the trial and summation of the evidence in that the specific allegations of misconduct were, at the time of the trial, objected to by counsel for the defendant and sustained by the trial court, thus precluding the defendant from arguing that misconduct tainted impartiality of proceedings, and alleged misconduct of prosecutor with respect to closing remarks was not supported by record. RCr 9.22.

8. Criminal Law, Key 713

Ambiguous remarks of prosecutor on closing argument should not be construed to have its most damaging meaning in that such remarks are clearly in category of argument rather than evidence.

9. Criminal Law, Key 795(1)

Trial court did not err in refusing to instruct jury on a lesser included offense during guilt phase of trial, where governing statutes pertained to separate, distinct offenses, one being a narcotic and one being a nonnarcotic, and only evidence presented during trial with respect to substance allegedly sold by defendant was that it was a Schedule II narcotic. KRS 218A.990(1, 2).

10. Criminal Law, Key 1202(7)

Alleged error appearing by reason of fact that, with respect to charge of being persistent felony offender, defendant's age at time offenses were committed was not proved was not subject to review where error was not preserved in that no motion for directed verdict was made at close of persistent felony offender charge.

11. Criminal Law, Key 1035(6)

Alleged error on part of trial court in restricting defendant's voir dire examination of jury panel was not preserved for review where defendant failed to object to those restrictions in trial court. KRS 218A.990(1, 2).

12. Jury, Key 131(4)

Trial court's restrictions of defendant's voir dire examination of jury panel were well within scope of rule and did not deny defendant his basic right to a fair and impartial trial. RCr 9.38.

Jack Emory Farley, Public Advocate, Kevin McNally, Asst. Public Advocate, Frankfort, for appellant.

Steven Beshear, Atty. Gen., Victor Fox, Asst. Atty. Gen., Frankfort, for appellee.

Before Breetz, Cooper and White, J.J.

Cooper, Judge.

This is an appeal from a judgment convicting the appellant of trafficking in a controlled substance and convicting him of being a persistent felony offender. KRS 218A.990(1); KRS 532.080. The appellant was sentenced to ten years and eleven years respectively, ten of those years without parole. The principal issues raised herein are whether the appellant's due process rights were denied by (1) the trial court's refusal to allow the introduction

of mitigating evidence with respect to the charge of being a persistent felony offender; (2) pre-trial discovery responses on the part of the Commonwealth; (3) prosecutorial misconduct; (4) the trial court's refusal to instruct the jury with respect to the non-parole limitations of KRS 532.080(7); (5) the trial court's refusal to instruct the jury under KRS 218A.990(2); (6) the absence of proof of all elements of the charge of being a persistent felony offender; and (7) the trial court's restriction on voir dire examination. On review, we affirm.

The appellant, James Michael White, was indicted in December of 1979 for trafficking in a controlled substance — Schedule II — dilaudid. The appellant was charged with selling a quantity of the drug to an undercover police officer in August of 1979. KRS 218A.070 and KRS 218A.990(1). Additionally, he was charged with being a persistent felony offender. KRS 532.080. The appellant was tried by a jury in January of 1980, and convicted of both charges. He was sentenced to ten years on the first charge, and eleven years on the second. It is from this judgment that he now appeals.

[1] Initially, the appellant argues that he was denied both federal and state constitutional rights of due process in that the trial court refused to allow him to introduce mitigating evidence on the charge of being a persistent felony offender. In effect, he argues that he should have been allowed to introduce evidence by a psychologist and members of his family as a defense to the charge. We reject this argument. The sole issue to be determined in a persistent felony offender phase of a trial is that of status; that is, does the accused meet the statutory definition of being a persistent felony offender. Evidence which supports or refutes the determination of that status is therefore admissible. Conversely, character evidence such as that sought to be introduced here is inadmissible in that it neither

proves nor disproves the status. This clearly is irrelevant and immaterial to the question involved. *See Hardin* v. *Commonwealth*, Ky., 573 S. W. 2d 657 (1978). To admit such character evidence would, in effect, be to grant the appellant a retrial on past felony convictions. This cannot be done. *Allen* v. *Commonwealth*, 272 Ky. 533, 114 S. W. 2d 757 (1938).

[2-4] In a related argument, the appellant argues that he was denied due process in that the trial court precluded him from informing the jury about the strict non-parole provision contained within KRS 532.080(7). The trial court acted correctly. The purpose of bifurcating the persistent felony offender stage of a trial is to avoid creating an unfair influence upon the question of the guilt or innocence of the defendant with respect to the current charge. Yet, this proceeding is not designed to provide a separate sentencing phase where mitigating or aggravating factors surrounding the charge can be presented. KRS 532.080 precludes certain types of clemency. Probation and parole are not constitutional rights, but, rather, are legislative clemencies granted as a matter of grace. Consequently, we do not believe that the appellant had a constitutional right to inform the jury about the strict limitations of the statute.

[5, 6] Secondly, the appellant argues that he was denied due process as a result of the Commonwealth's misleading responses to certain discovery requests. Specifically, he argues that the Commonwealth failed to inform him that the police officer involved had handwritten notes, and that an oral statement had been made by the appellant to that officer. Under RCr 7.24, oral statements and conversations do not come within the scope of discovery. Only written statements and confessions are discoverable. Therefore, the Commonwealth's response that it had no written or

recorded statements made by the defendant was technically correct. Clearly, the Commonwealth was not required to provide the appellant with any and every oral statement he made to any of the witnesses involved. Furthermore, RCr 7.24(2) specifically prohibits from discovery the notes of a police officer or agent of the Commonwealth. Again, the response to the request was technically proper. If the appellant were mislead in this respect, it is not attributable to the actions of the Commonwealth.

[7, 8] Thirdly, the appellant argues that he had denied a fair and impartial trial as the result of the misconduct of the prosecutor, both during the trial and the summation of the evidence. On review, we find that the alleged misconduct did not deny the appellant a fair and impartial trial. Specific allegations of misconduct were, at the time of the trial, objected to by counsel for the appellant and sustained by the trial court. Accordingly, the appellant cannot argue that such misconduct tainted the impartiality of the proceedings. *Brown* v. *Commonwealth*, Ky., 449 S. W. 2d 738 (1969); RCr 9.22. Furthermore, the alleged misconduct of the prosecutor with respect to his closing remarks is clearly not supported by the record. An ambiguous remark should not be construed to have its most damaging meaning. *Donnelly* v. *De Christoforo*, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Closing remarks are clearly in the category of argument rather than evidence. Therefore, the prosecutor, as well as the defense attorney, should be given some latitude in this respect.

[9] Fourthly, the appellant argues that the trial court erred in refusing to instruct the jury on a lesser included offense during the guilt phase of the trial. KRS 218A.990 (1), (2). We reject this argument. KRS 218A.990(2) is not a lesser included offense to that set forth in KRS 218A.-990(1). They pertain to separate, distinct offenses, one

being a narcotic and one being a non-narcotic. The only evidence presented during the trial with respect to the substance allegedly sold by the appellant was that it was a Schedule II narcotic. Consequently, the trial court did not err in refusing to accept appellant's instruction on a lesser included offense.

[10] Sixthly, the appellant argues that he was denied due process with respect to the charge of being a persistent felony offender in that an essential element of that offense —the age of the appellant at the time the offenses were committed—was not proved. Although the record reflects the fact that this element may not have been proved, there was no preservation of error for review. No motion for directed verdict was made at the close of the persistent felony offender stage. *Crawley* v. *Kunzman*, Ky., 585 S. W. 2d 387 (1979). Although situations exist in which it would be a manifest injustice for a reviewing court to decline to review an error, even though such error had not been preserved for review, we do not believe this constitutes one of those situations. *Stone* v. *Commonwealth*, Ky., 456 S. W. 2d 43 (1970).

[11, 12] Finally, the appellant argues that he was denied due process of law in that the trial court restricted his voir dire examination of the jury panel. Although the appellant tendered instructions to the trial court, no ruling was requested by him. RCr 9.22. Furthermore, the appellant failed to object to the trial court's restrictions of the voir dire examinations. More importantly, the trial court's restrictions were well within the scope of RCr 9.38, and did not deny the appellant the basic right to a fair and impartial trial.

The judgment is affirmed.

All concur.